

In the Matter of the Compensation of
JAMES HIBBS, Claimant

WCB Case No. 22-00060

ORDER ON REVIEW

Julene M Quinn LLC, Claimant Attorneys
Babcock Holloway Caldwell & Stires, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that declined to award penalties and penalty-related attorney fees for the employer's allegedly unreasonable claim processing. On review, the issues are jurisdiction and, potentially, penalties and attorney fees. We vacate the ALJ's order, dismiss claimant's hearing request, and transfer this matter to the Workers' Compensation Division (WCD).¹

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.²

Claimant sustained a compensable injury on January 19, 2016. (Ex. 1). The employer initially accepted a cervical strain and a concussion. (Ex. 3).

In March 2016, claimant underwent an examination by Dr. Wicher, a psychologist, at the employer's request. (Ex. 2). Claimant was subsequently evaluated by Dr. Schwartz, an orthopedic surgeon, at the employer's request in April 2016. (Ex. 4).

¹ On review, the employer requests that we take administrative notice of an April 13, 2022, order issued by the Hearings Division in WCB Case No. 21-05190, which is a matter that involves the same parties. See *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985) (Board may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Timothy C. Guild*, 68 Van Natta 741, 743 n 3 (2016) (Board may take administrative notice of agency orders involving the same claimant). Claimant objects to the employer's request, asserting that the order is not relevant to this matter. We need not decide whether we may take administrative notice of the order, because, even if we could do so, it would not affect the outcome of this appeal.

² On page one, second paragraph of the ALJ's order, we replace "Exhibits 1-13" with "Exhibits 1-13, 4A, 4B, 6A, 6B, 6C, 8A, 8AA, 9A, 10A, 10B."

The employer closed the claim in July 2016. (Ex. 4B).

In February 2018, claimant was evaluated by Dr. Binder, a psychologist, at the employer's request. (Ex. 5).

In October 2020, the employer modified its notice of acceptance to include anxiety disorder, somatic symptom disorder, and unspecified depressive disorder after a prior Board order determined that the conditions were compensable. *See James D. Hibbs*, 72 Van Natta 819 (2020). (Ex. 6).

At the request of Dr. Blaylock, his attending physician, and the employer, claimant was seen by Dr. Schneider, a psychologist, for a closing examination in August 2021. (Exs. 6C, 7, 8).

On several occasions in October and November 2021, Dr. Blaylock stated that he would not perform a closing examination, and that an orthopedic independent medical examination (IME) should be scheduled to determine claimant's permanent impairment. (Exs. 8A-3, 10A-1, 10B-7, -19, -22-23).

On December 20, 2021, the employer mailed claimant an appointment notice for a January 4, 2022, IME scheduled with Dr. Grossenbacher, an orthopedic surgeon.³ (Ex. 12). This notice represented, among other things, that claimant must attend the examination and, if there was not a good reason for a failure to attend or to cooperate with the examination, workers' compensation benefits may be suspended pursuant to ORS 656.325 and OAR 436-060. (Ex. 12-1). It further noted that, if the appointment was for a mandatory closing examination, it was claimant's responsibility to attend the examination and failure to do so may result in claim closure and possible loss or reduction in benefits. (Ex. 12-1-2). Claimant did not attend the examination. (Ex. 13).

On January 5, 2022, claimant requested a hearing, seeking penalties and penalty-related attorney fees pursuant to ORS 656.262 and ORS 656.382.⁴ (Hearing File.) In an addendum submitted with the hearing request, claimant's counsel clarified that the issues included an unreasonable IME notice. (*Id.*)

³ At hearing, the parties stipulated that the employer did not request Director approval prior to issuing its December 20, 2021, notice. (Tr. 12-13).

⁴ The hearing request also raised issues pertaining to ORS 656.262(14) concerning an interview bill. That matter was resolved and bifurcated from the present dispute prior to hearing. (Tr. 4-5).

CONCLUSIONS OF LAW AND OPINION

At hearing, claimant contended that, pursuant to ORS 656.325(1)(a), no more than three IMEs may be requested in a claim, and that the employer's December 2021 IME notice was unreasonable because it required him to attend an additional IME without authorization from the Director. Thus, claimant argued that he was entitled to penalties and penalty-related attorney fees. In response, the employer asserted that the Hearings Division did not have jurisdiction because the dispute did not involve a "matter concerning a claim." Resolving the issue on the merits, the ALJ concluded that the employer's appointment notice was not unreasonable and, therefore, declined to award penalties and penalty-related attorney fees.

On review, claimant renews his contention that the employer's December 2021 appointment notice was unreasonable, and, as such, that he is entitled to penalties and penalty-related attorney fees. Additionally, claimant asserts that the Hearings Division and the Board have jurisdiction to resolve this dispute pursuant to ORS 656.325(6) because it pertains to the employer's request for an additional IME under ORS 656.325(1)(a). Claimant also asserts that the dispute involves a "matter concerning a claim" because the employer's December 2021 IME notice indicated, among other things, that claimant's benefits could be reduced or suspended for failing to attend the examination.⁵ Based on the following reasoning, we vacate the ALJ's order, dismiss claimant's hearing request, and transfer this matter to the WCD.

The WCD has the initial authority to grant or deny requests for IMEs beyond the initial three permitted by statute. ORS 656.325(1)(a).⁶ The WCD has promulgated rules addressing disputes related to requests for additional IMEs. *See* OAR 436-010-0265(12), OAR 436-060-0095. Further, the statutory and

⁵ While the employer's December 2021 IME notice raised the *possibility* that claimant's benefits could be reduced or suspended for failing to attend the January 4, 2022, IME, there is no indication that the employer took any adverse action against claimant for his non-attendance, such as reducing or suspending his benefits or pursuing a "suspension order." Therefore, claimant's right to receive compensation is not "directly at issue," and the dispute does not constitute a "matter concerning a claim." *See* 656.704(3)(a).

⁶ ORS 656.325(1)(a) states, "no more than three independent medical examinations may be requested except after notification to and authorization by the director."

regulatory scheme provides that litigation involving disputes other than “matters concerning a claim” should be initiated with the Director. *See* ORS 656.704(2)(a);⁷ OAR 436-060-0008(3).⁸

Conversely, the Hearings Division and the Board have jurisdiction over “matters concerning a claim.” *See* ORS 656.283(1); ORS 656.704(1), (3)(a). “Matters concerning a claim” are defined as “matters in which a worker’s right to receive compensation, or the amount thereof, are directly in issue.” ORS 656.704(3)(a).

Additionally, the Board has determined that ORS 656.325(6) vests itself and the Hearings Division with the jurisdictional authority to review WCD orders approving or denying requests for additional IMEs.⁹ *See Roberta L. Jones-Lapeyr*, 58 Van Natta 2202, 2205 (2006) (the Hearings Division and the Board had jurisdiction to review a WCD order denying the carrier’s request for an additional IME).¹⁰

Here, neither claimant nor the employer is appealing a WCD order or seeking enforcement of a WCD order. We acknowledge that ORS 656.325(6) may provide an exception to the general rule that the jurisdiction of the Hearings Division and the Board is limited to “matters concerning a claim.” *See Jones-Lapeyr*, 58 Van Natta at 2204-05. However, given that the WCD has the initial authority to review disputes involving requests for additional IMEs, the jurisdictional exception in such matters is limited to an ALJ’s and the Board’s review of WCD orders. *See* ORS 656.325(1)(a); *Jones-Lapeyr*, 58 Van Natta at 2205. Moreover, in this case claimant’s sole request for relief concerning the employer’s December 2021 IME notice is the assessment of ORS 656.262 penalties and penalty-related attorney fees. ORS 656.325(6) does not provide the

⁷ ORS 656.704(2)(a) states, “a party dissatisfied with an action or order regarding a matter other than a matter concerning a claim under this chapter may request a hearing on the matter in writing to the director.”

⁸ OAR 436-060-0008(3) states, “any party, or assigned claims agent, that disagrees with an action taken under these rules, except [for ‘matters concerning a claim’], may request the director to conduct an administrative review of the action.”

⁹ ORS 656.325(6) states, “any party may request a hearing on any dispute under [ORS 656.325] pursuant to ORS 656.283.”

¹⁰ Again, initial review of such “actions” lies with the director, not the Board. OAR 436-060-0008(3) (set forth above, n 9).

Hearings Division or the Board with jurisdiction to resolve the matter. *See Earl M. Binger*, 63 Van Natta 1940, 1941 (2011) (the Director had exclusive jurisdiction where the claimant's hearing request sought penalties and attorney fees regarding the carrier's allegedly unreasonable claim processing of requesting that the Director suspend benefits, rather than a request concerning the Director's suspension order pursuant to ORS 656.325(2)). As previously explained, this dispute does not involve a "matter concerning a claim," and it is premature to apply ORS 656.325(6). *See* ORS 656.283(1); ORS 656.325(1)(a); ORS 656.704(1), (3)(a); *Jones-Lapeyr*, 58 Van Natta at 2205. Therefore, the WCD has exclusive jurisdiction to resolve the matter. *See* ORS 656.704(2)(a); OAR 436-060-0008(3).

Furthermore, consistent with ORS 656.704(5), we are authorized to transfer a request for hearing that should have been filed with the Director to the WCD. *See Harry L. Rumer*, 69 Van Natta 536, 539-40 (2017).

Accordingly, based on the aforementioned reasoning, we vacate the ALJ's order, dismiss claimant's hearing request, and transfer this matter to the WCD for resolution of claimant's request for relief.

ORDER

The ALJ's order dated February 7, 2022, is vacated. Claimant's hearing request is dismissed. This matter is transferred to the WCD for resolution of claimant's request for relief.

Entered at Salem, Oregon on January 18, 2023